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Congress Eases Burden of Consumer Product Safety Law

Joanne M. Murray • Antheil Maslow & MacMinn, LLP • August 17, 2011

On August 1, 2011, amid the flurry of negotiations, posturing and press conferences on the debt ceiling bill, Congress quietly and without much fanfare passed an amendment to the Consumer Product Safety Improvement Act of 2008 ("CPSIA") that will dramatically affect the consumer product industry. The legislation passed with overwhelming support in the House and Senate and was signed into law by the President on August 12.

In the nearly three years since the passage of the CPSIA, the Consumer Product Safety Commission ("CPSC") on several occasions deflected criticism of its regulations by asserting that only Congress had the authority to grant the relief requested by various stakeholders. It is fitting, therefore, that the stated purpose of the legislation is "to provide the Consumer Product Safety Commission with greater authority and discretion in enforcing the consumer product safety laws."

The new law addresses several key topics relating to toys and other children's products, including: (i) lead content limits for children's products; (ii) third party testing requirements for children's products; (iii) phthalates limits; and (iv) tracking labels. The legislation also addresses industry concerns regarding materially inaccurate information contained in reports on the CPSC's consumer complaint database.

Lead Limit for Children's Products

Toy manufacturers, importers and retailers breathed a collective sigh of relief on August 1 at Congress's clarification that the 100 ppm lead content limit, which went into effect on August 14, does not apply retroactively to children's products in inventory. This standard only applies to products manufactured after August 14.

In addition, Congress codified the "functional purpose" exception that has been discussed in industry circles since the adoption of the CPSIA. In essence, this provision permits the CPSC to grant an exemption from the lead content rules if it determines that: (i) a product (or class of product, material, or component part) cannot be manufactured without lead either because it is not practicable or because it is not technologically feasible, (ii) the product is not likely to be placed in a child's mouth or ingested during the normal and reasonably foreseeable use and abuse of the product; and (iii) granting an exemption would have no measurable adverse effect on public health. Historically, the effect on public health was measured by reference to blood lead levels in children. The new law permits the CPSC in its discretion to adopt an alternative method. An exception can be granted by the CPSC on its own initiative or upon application of an interested party, in which case the interested party bears the burden of proof.

The legislation contains an exemption from the lead limits for off-highway vehicles (including snowmobiles). It also exempts used children's products other than children's metal jewelry and children's products for which the seller or donor has actual knowledge of non-compliance.

Third Party Testing of Children's Products

The amendment has several effects on the third party testing of children's products. It clarifies that the CPSC must establish standards and protocols for the testing of representative samples (rather than the more stringent requirement of using random samples). It also directs the CPSC to revisit existing third party testing regulations within one year, taking into account public comments as to how testing costs might be reduced. Congress suggested that such comments might touch on topics such as redundant third party testing, sampling procedures, component testing, use of alternative testing technologies, and whether compliance with international standards should provide a reference for CPSC compliance.

The new law requires the CPSC to consider the economic, administrative and other limitations applicable to small batch manufacturers (generally defined as manufacturers with annual total gross sales of no more than \$1 million) when implementing third party testing requirements. It must provide, after notice and a hearing, alternative testing requirements for covered products manufactured by small batch manufacturers. Alternatively, the CPSC may allow certification of a product produced by a small batch manufacturer based on compliance with another national or international governmental standard, as long as that standard is at least as rigorous as the consumer product standard enforced by the CPSC. The small batch manufacturer exemption, however, is not applicable to the lead paint and small parts standards nor is it available for certain classes of children's products, such as cribs, children's metal jewelry, and baby bouncers, walkers and jumpers.

Under the new law, ordinary books and ordinary paper-based printed materials are no longer subject to the third party testing requirements of the CPSIA. Additionally, the third party testing requirement as it pertains to lead content no longer applies to metal component parts of bicycles.

Phthalates Limits

The CPSIA limits or bans the use of certain phthalate compounds in toys and child care articles. The new legislation clarifies that these limits do not apply to component parts that are not accessible to a child through normal and reasonably foreseeable use and abuse of the product, as determined by the CPSC. More specifically, if a component part is not physically exposed to the child by reason of a sealed covering or casing and that covering or casing is not likely to be disturbed through reasonably foreseeable use and abuse of the product (including swallowing, mouthing, breaking or other children's activities, as well as the aging of the product), then that part is not accessible to a child. The CPSC is charged with the task of developing a rule to provide guidance with respect to this provision.

Tracking Labels

Another provision of the CPSIA that has troubled manufacturers is the tracking label requirement, which requires manufacturers of children's products (not simply toys) to affix a permanent mark that contains information such as the source of the product, the manufacturing date, and a batch or run number. Following the enactment of the CPSIA, the CPSC issued a statement of policy to provide guidance to manufacturers grappling with how the tracking label requirement applies to their products. With the new legislation, Congress has stepped in and provided manufacturers with further comfort by specifically authorizing the CPSC to grant exclusions from the tracking label requirement where the CPSC determines that compliance would be impracticable.

Consumer Complaint Database

Earlier this year, the CPSC launched the CPSIA-mandated public database allowing consumers to lodge safety complaints against product manufacturers. A major concern expressed by manufacturers was that the CPSC was required to publish information provided by the consumer, even if it was materially inaccurate. If the manufacturer later demonstrated that the information was materially inaccurate, the information would be removed from the database. But from the perspective of the manufacturer, that is akin to trying to put the toothpaste back in the tube. The new legislation addresses this concern by requiring the CPSC to refrain from publishing the consumer's report for five days if the CPSC receives notice that the information contained in the report is materially inaccurate.

Conclusion

The new legislation provides much-needed clarity and relief for many manufacturers, particularly small manufacturers and those in specific industries such as book publishers and bicycle and off-highway vehicle manufacturers. The determination that the 100 ppm lead content limit does not apply retroactively to products in inventory is certainly a welcome development for manufacturers. On the other hand, the new legislation does not contain some of the industry-friendly provisions contained in prior bills, such as delaying the implementation of the 100 ppm standard until 2012 and restricting the lead limits to products designed primarily for use by children age six and younger that can be placed into a child's mouth. Nevertheless, the opportunity to provide comments and suggestions with respect to third party testing requirements offers manufacturers and other stakeholders the ability to voice their remaining concerns, and the new functional purpose exception will allow manufacturers to seek relief from the lead limits.

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